he merely states in his written judgment that the Chinese Affairs Officer gave evidence and proved that the exhibits related to 100 and 1,000 character lotteries.

I can only conclude that he quite failed to appreciate his duty to make up his own mind and in the result the appeal must be allowed and the conviction and sentence quashed.

Order accordingly.

Solicitors for the appellants: *Lim Kheng Kooi; Conaghan, Wreford & Thornton.*

PUBLIC PROSECUTOR v. TAN KENG SIEW

[A. Cr.. J. (Buhagiar J.) March 11, 1955]

[K. L. — Criminal Appeal No. 8 of 1955]

Merchandise Marks Ordinance, 1950, ss. 11, 12 and 19 — Meaning of trade mark or property mark — Meaning of "Trade Description" — Admissibility of evidence obtained as a result of illegal search.

This was an appeal by the Public Prosecutor against the decision of the learned President of the Sessions Court Kuala Lumpur. At the trial the prosecution sought to bring four charges against the respondent — two under s. 11 of the Merchandise Marks Ordinance for being in possession of a false trade mark namely the "Excide" Trade Mark and two under s. 19 of the Ordinance for being in possession of goods to which the false trade description of "Silver Excide" had been applied. The learned President refused to allow the two amended charges under s. 11 of the Ordinance as he held that that section related to the possession of detachable marks such as labels or plates which are to be fixed on goods and not to marks embossed on goods, as in this case. The learned President acquitted the respondent on the charges under s. 19 of the Ordinance as he held that the word "Excide" did not denote a false trade description.

Held: (1) there was nothing in the Merchandise Marks Ordinance which restricts the meaning of trade or property mark to detachable marks such as labels or plates which can be affixed to the goods and the learned President was therefore wrong in holding that the mark in this case was not a trade mark; (2) the term "Silver Excide" in this case did not come within the definition of a "trade description".

Semble: The exhibits seized in this case were admissible notwithstanding that the provisions of s. 28(1) of the Merchandise Marks Ordinance relating to search were not complied with.

Cases referred to:—

(1) *Fowler v. Cripps* (1906) 1 K.B. 16, 20.

(2) *Cameron v. Wiggins* (1901) 1 K.B. 1.

(3) *Watson v. Dr. Jaegar's Sanitary Woollen System Co.* 13 T.L.R. 150.

(4) *Wong Liang Nguk v. Public Prosecutor* (1953) M.L.J. 246.

(5) *Karuma v. Regina* "The Times" December 9, 1954; (1955) 2 W.L.R. 223.

MAGISTRATE'S CRIMINAL APPEAL.

J. P. Kirby (Federal Counsel) for the appellant.

K. C. Chia for the respondent.

Cur. Adv. Vult.

Buhagiar J.: — The respondent was originally charged at the Sessions Court, Kuala Lumpur, as follows:—

"That you on the 12th day of August, 1954, at No. 320 Batu Road, Kuala Lumpur, in the State of Selangor, did sell certain goods, to wit, Excide Batteries with counterfeit trade marks, and thereby committed an offence punishable under Section 12 of the Merchandise Marks Ordinance 10/50."

At the commencement of the trial four fresh charges were substituted for the original charge; those charges were as floows:—

1st Charge: That you on the 12th August, 1954 at 320 Batu Road, Kuala Lumpur, in the State of Selangor, had in your possession a trade mark, namely the "EXCIDE" Trade Mark, for the purpose of denoting that goods, namely batteries, were the manufacture of Chloride Batteries Ltd., when they were not, and thereby committed an offence punishable under Section 11 of the Merchandise Marks Ordinance, 1950.

2nd Charge: That you at the same time and place sold to one M. A. Jones, goods, namely a battery, to which a false trade description had been applied in that the said battery was described as being a "SILVER EXCIDE" battery when it was not, and thereby committed an offence punishable under Section 19 of the Merchandise Marks Ordinance, 1950.

3rd Charge: That you on the 17th day of August, 1954, at 320 Batu Road, Kuala Lumpur, in the State of Selangor, had in your possession a trade mark, namely the "EXCIDE" Trade Mark, for the purpose of denoting that goods, namely, batteries were the manufacture of Chloride Batteries Ltd., when they were not and thereby committed an offence punishable under Section 11 of the Merchandise Marks Ordinance, 1950.

4th Charge: That you, at the same time and place, had in your possession for the purpose of trade, goods, namely batteries, to which a false trade description had been applied, namely the description of "SILVER EXCIDE" and thereby committed an offence punishable under Section 19 of the Merchandise Marks Ordinance, 1950.

The learned President declined to allow the first and third charges and having heard the case for the prosecution on the second and fourth charges acquitted and discharged the respondent without calling upon him for his defence.

The learned President did not allow the first and third charges because, as he stated in his grounds of judgment a charge under this section (section 11 of the Merchandise Marks Ordinance, 1950) clearly related to a trade mark or property mark itself and not the goods. The words "has in his possession a trade mark or property mark for the purpose of denoting that any goods etc., clearly relate to possession of detachable marks such as labels or plate which are to be fixed on to goods."

With regard to the second and fourth charges the learned President held that the word "Excide" did not denote a false trade description.

The Public Prosecutor appealed against this decision on the following grounds:—

(1) with regard to the first and third charges that the learned President wrongly disallowed the amended charges for the reasons given by him in his grounds of judgment;

(2) with regard to the second and fourth charges on the ground that the learned President wrongly held that the Silver Excide sign embossed and painted on the batteries in question did not denote a false trade description under section 19.

The Deputy Public Prosecutor has informed me that (except for certain formal evidence which was not admitted in view of the decision taken by the learned President in disallowing the first and third charges) the Prosecution has no other evidence in respect of those charges under Section 11, apart from that on the record.

The facts in respect of all four charges are briefly as follows:—

The respondent is the managing proprietor of the firm Chin Hoe & Co. with premises at 320 Batu Road, Kuala Lumpur. On the 12th August, 1954, one Mr. Jones, accompanied by one Mr. Missel went to the respondent's business premises and asked an attendant in the shop for a 6 volt Excide battery. A battery was produced and Mr. Jones paid $55 or $60. Mr. Jones thought the battery was new; he was not informed by the attendant that it was not new. This battery bears No. H 1397 and is Exhibit P. 2. There were other similar batteries on the rack in the shop exposed for sale.

On the 17th August, 1954 Inspector of Police Derek Koch accompanied by Det. Cpl. 304 went to the respondent's business premises and after producing a search warrant searched those premises with the consent of the respondent. There he found 14 batteries which are Exhibit P. 5.

The Borneo Motors are the sole agents of Excide batteries manufactured by Chloride Batteries Ltd. At the beginning of 1954 they started selling a "Silver Excide" battery which has a porbic plastic type of separator while the previous types had a wooden separator.

The casing of the batteries (Exhibits 2 and 5) are genuine Excide but the inside are not Excide manufacture. The mark on these batteries consists of an impressed oblong silver in colour with the word "Excide" embossed in red on the silver background.

In my opinion the ground given by the learned President in not allowing the first and third charges is wrong. Section 11 of the Merchandise Marks Ordinance, 1950 consists of two parts:—

(1) the first part prohibits the possession of any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark;

(2) the second part prohibits the possession of a trade mark or property mark for the purpose of denoting that any goods are the manufacture or merchandise of a person whose manufacture or merchandise they are not, or that they belong to a person to whom they do not belong.

I cannot see anything in this section or anywhere in the Ordinance, which restricts the meaning of trade mark or property mark to detachable marks such as labels or plate which can be affixed to the goods. There are many instances of trade marks which are embossed on the goods themselves apart from or in addition to the trade mark on any label or wrapper or container in which the goods are contained. The learned President seems to have found this restriction of meaning in the first part of section 11, where the words "die" and "instrument" are used; but I see no reason why the instrument cannot be one which is used to impress a trade mark on, say, bottles of beer or mineral waters. Furthermore, the learned President seems to have been of opinion that the trade mark or property mark used in the second part of that section must be a counterfeit mark made from the die, plate or other instrument I do not think this is so. A person may be guilty of an offence under that section if he is in possession of genuine trade mark or property mark if the purpose of such possession is that of denoting that any goods are the manufacture or merchandise of a person whose manufacture or merchandise they are not etc.

Thus under the second part of this section a manufacturer of mineral waters who is in possession of bottles on which there is embossed the trade mark or property mark of a rival manufacturer would be guilty of an offence if, (and in this consists the *mens rea* in this offence) it can be shown that the purpose of that possession is to fill such bottles with his own mineral waters and sell such waters.

Adopting these principles to the case of the Excide batteries in question, a person in possession of genuine castings with the genuine trade mark "Excide" embossed on them would be guilty of an offence if the necessary *mens rea* as explained above is present, that is, that they were in his possession with the object of putting plates and chemicals in these casings and selling the complete articles as Excide batteries. In this case the respondent was in possession of the complete batteries ready for use (except perhaps for the charging) and they were exposed for sale. It seems to me that these facts are covered by section 12, (subject of course to the defences allowed under that section). It may be argued that if a person is in possession of a complete article *multo magis* he is in possession of a component part and if a person can be charged under section 12, he may equally be charged under section 11. I do not think that is necessarily so. Section 11 and section 12 prohibit two different acts and if the person who

commits any of the acts prohibited by section 11 is the same as the person who commits the acts under section 12 then that person would be subject to charges under either of those sections. But there may be cases where two different persons are involved and the person committing the acts prohibited by section 12 is ignorant of the commission by the first person of the acts prohibited by section 11; hence the defences contemplated by section 12.

It seems quite clear that in this case the respondents purchased the batteries from another person. The Inspector who searched the business premises of respondent stated that the respondent did everything to help him by giving him information as to where he had acquired the batteries. Under the circumstances I do not consider that the proper charge would be one under section 11 but under section 12. Therefore while the appeal with regard to the first and third charges must succeed in so far as the grounds given by the learned President for disallowing at the beginning of the trial the said amended charges are wrong in law, I do not consider that the matter should be referred back to the Sessions Court for further proceedings.

With regard to the second and fourth charges, the Deputy Public Prosecutor submitted that the silver background on which the word "Excide" was embossed was a trade description within the meaning of paragraph (d) in the definition given to the phrase in section 2 of the Merchandise Marks Ordinance, 1950. Mr. Moore (P.W. 7) who is an electrical engineer and also sales manager for Chloride Batteries Ltd., and who has been concerned with batteries for 20 years and with his present employers for 9 years stated as follows:— The main features of the Silver Excide are:—

(1) a special alloy in the plate grids
(2) the container was genuine hard rubber; and
(3) were fitted with new plastic separator instead of a wooden one.

I do not see any connection at all between the silver oblong on the casing of the batteries and the material of which the batteries are composed. The Deputy Public Prosecutor relied on the final part of the definition of "trade description" according to which "the use of any figure, word or mark, which according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of the Ordinance." To my mind the important words in this part of the definition are the words "which according to the custom of the trade"; now, I do not think that "according to the custom of the trade" means "according to the custom of a particular firm or person in the trade" but according to the common acceptance of a mark in the trade generally. There is support for this view in the judgment of Will J., in *Fowler v. Cripps*[1] where he said: "The Merchandise Marks Act is an act passed not to ensure scientific accuracy in trade terms, but to protect trade, and to ensure as far as legislation can do so that trade shall be carried on honestly and that terms shall not be applied to substances where the application would, according to the common acceptance of those terms in the trade, lead the purchaser to assume that he was buying something different from what he really was buying." (See also *Cameron v. Wiggins*[2], *Watson v. Dr. Jaegar's Sanitary Woollen System*[3]).

There is no evidence to show that the word 'silver' or an oblong or any background coloured silver on a battery implies, according to common acceptance of that mark, that a battery has the special features described by Mr. Moore. Indeed it seems from the evidence of Mr. Moore that the word 'silver' or a mark coloured silver on batteries is a peculiar characteristic of Chloride Batteries Ltd.

I shall finally deal with a point raised by Mr. K. C. Chia for the respondent. He submitted that the search carried out by Inspector Koch was carried out under a warrant issued not in accordance with provisions of section 28(1) of the Merchandise Marks Ordinance, 1950. Under that section information that there is reasonable cause to suspect that any goods or things in relation to which an offence has been committed are within the house or premises of the defendant or otherwise in his possession or under his control in any place must be on oath and in the present case, information was not given on oath. Mr. Chia therefore submitted that the search was carried out illegally and evidence obtained in the course of and by means of such illegal search (i.e., the batteries, Exhibit 5) was inadmissible.

There is authority for the proposition that evidence unlawfully obtained is admissible — see *Wong Liang Nguk v. Public Prosecutor*[4]. There is also authority for this proposition in the recent case of *Karuma v. Queen*[5] argued before the Judicial Committee of the Privy Council on the 8th December 1954 (vide report in 'The Times' of 9th December 1954). In that case the main ground of appeal was that the appellant had been searched by a Police constable without a warrant whereas under the Emergency Regulations in force in Kenya, only a Police Officer of or above the rank of an Assistant Inspector had the power of search and it was contended that evidence obtained in the course of and by means of an illegal search was inadmissible. Their Lordships said that they were clearly of opinion that evidence in question was admissible.

There may be instances where failure to comply with the provisions of law regarding the issue of search warrants may exclude some of the effects of the search carried out as a result of the warrant so issued. A good example of this is to be found in the Common Gaming Houses Ordinance, 1953 (No. 26 of 1953). Under section 19 of that Ordinance a presumption that a place is a common gaming house and that the same is so kept or used by the occupier thereof is raised in cases where instruments or appliances for gaming are found in any place entered under that Ordinance. That Ordinance contains provisions regarding formalities to be followed before a warrant of arrest or of search is to be issued. If these provisions are not followed then a place is not entered *under* that Ordinance and the presumption under Section 19 would not arise. In the present case therefore Ex. 5 was admissible notwithstanding that the provisions of Section 28 were not complied with.

For the above reasons the appeal with regard to the second and fourth charges must fail.

Order accordingly

REGINA v. HOR HOW CHOO

[A. Cr. J. (Spenser Wilkinson J.) March 11, 1955]

[Penang — Criminal Appeal No. 5 of 1955]

Customs Duties (Exemption) Order, 1953 — Interpretation of — Duty of person to declare all dutiable articles.

The Customs Duties (Exemption) Order, 1953, provides that persons entering the Federation can take in without paying duty used portable articles, if imported in the baggage or on the person of the passenger and provided that the proper officer of customs is satisfied that the articles were such that a passenger might reasonably carry with him for his own regular and private use. The question in this case was whether the respondent had committed an offence in not declaring the two bangles which she was wearing in such a manner as not to be visible when she proceeded to the mainland from Penang. At the trial, the learned President of the Sessions Court acquitted her and against this acquittal the Crown appealed.

Held: (1) every passenger proceeding to the mainland is bound to declare all dutiable articles which he has with him and even used portable articles, if dutiable, remain liable to duty until they have been declared and allowed to pass by a Customs officer; (2) therefore the respondent in this case was wrongly acquitted.

MAGISTRATE'S CRIMINAL APPEAL.

D. C. Jackson (Sr. Federal Counsel) for the appellant.

I. K. Meek for the respondent.

Spenser Wilkinson J. : — At the conclusion of the hearing of this appeal I intimated that the appeal would be allowed and the respondent admonished and discharged, but as the point of law involved was of some importance I would give my reasons in writing, which I now do.

The respondent was charged with failing to make a declaration to the Customs authorities at Butterworth in respect of two gold bangles which she was wearing in such a manner as not to be visible when she proceeded to the mainland on the 28th December, 1954 and, alternatively, with being knowlingly concerned in an attempted fraudulent evasion of Custom duty on the bangles. She claimed trial and after hearing all the evidence the learned President of the Sessions Court acquitted her. From this acquittal the Crown appealed.

The only ground of appeal concerned the interpretation of the Customs Duties (Exemption) Order, 1953, which enables persons entering the Federation to take in without paying duty used portable articles, if imported in the baggage or on the person of the passenger and provided that the proper officer of Customs is satisfied that the articles are such as a passenger might reasonably carry with him for his own regular and private use. It was contended that as a matter of law the learned President should have convicted the respondent on the main charge.

In his grounds of decision the learned President stated that the only question to be decided was whether or not Section 99 of the Customs Ordinance puts a duty on all passengers to declare everything that would be dutiable but for the Customs Duties (Exemption) Order, 1953. He thought that if this Section placed a duty upon every passenger to declare everything the result would be startling, because passengers might have to declare everything they carried with them including their underwear. He found as a fact that the respondent had not declared the articles when she passed through the barrier. But in view of the fact that before being searched she then drew attention to the gold bangles which she was wearing under her armpits; of the fact that the bangles were portable personal articles; and of his reading of the law he acquitted the respondent.

For the Crown it was contended that it was the duty of a passenger to declare everything on his person or with him which was dutiable and that by reason of sub-section (3) of Section 13 of the Ordinance even goods such as portable articles remained dutiable unless and until they had been declared to the proper officer of Customs and he was satisfied that they could reasonably be used or carried for personal use.

In my opinion where the provisions of an enactment are clear the fact that those provisions may have